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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

FRIENDS OF THE LANDMARK FILBERT COTTAGES et al., Plaintiffs and Appellants, v. CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Respondents _____ DAVID LOW et al., Real Parties in Interest and Respondents.	A134325 (City & County of San Francisco Super. Ct. No. CPF-11-511263)

Nestled at the foot of San Francisco's Russian Hill are a group of residential structures known as the Filbert Street Cottages. The new owners of the cottages proposed a substantial "rehabilitation and expansion." The City and County of San Francisco determined that the proposed project was exempt from environmental review under the California Environmental Quality Act[1] and issued necessary permits and

[1] Public Resources Code, section 21000 et seq. (CEQA). Statutory references are to the Public Resources Code. References to "CEQA Guidelines" or "Guidelines" are to "the regulations promulgated by the Secretary of the Natural Resources Agency found in title 14 of the California Code of Regulations beginning at section 15000. . . . These guidelines are binding upon all state and local agencies in applying CEQA. (CEQA

approvals for the project to proceed. Neighbors opposed to the project tried to prosecute administrative appeals, but were repeatedly told that every attempt to appeal the exemption decision was untimely, and the attempt at appealing the issuance of the permits was prohibited by the San Francisco Charter. The neighbors' petition for a writ of mandate was denied on several grounds, one of which was that the petition was untimely according to the applicable statute of limitations specified by CEQA. We agree and affirm.

BACKGROUND

The property at issue measures 62.5 feet by 137.5 feet. On this lot are four two-story cottages, one of which has an attached "studio" that is sometimes treated as a separate structure. Collectively, they have ten dwelling units. The cottages were built in 1907, the studio added in 1943. All five structures were placed on the San Francisco register of city landmarks in 2001.[2]

When bought by David Low and Dominique Lahaussois in 2007, the property had clearly seen better days. When Low and Lahaussois first applied for permission to renovate with an underground garage in 2008, none of the units was occupied, and the

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Guidelines, § 15000.)" (*Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245, 1256, fn. 12.)

[2] The City's Planning Department assessed the property as meeting three of the four criteria for inclusion on the California Register of Historic Resources (see § 5024.1, subd. (c)), specifically, because the property: (1) "is associated with the aftermath of the 1906 Earthquake and Fire and the post-emergency housing needs of that time," and "is also associated with important periods in San Francisco art history"; (2) "is associated with the life of Marian Hartwell, a faculty member of the California School of Fine Arts (now the San Francisco Art Institute)"; and (3) "is an example of vernacular post-earthquake period architecture with a unique siting and court plan. This architecture is characterized by wood-frame construction, rusticity, simplicity, and informality."

There is nothing in the record to suggest that the proposed renovation will not preserve the distinctive exterior of the structures. If the interiors of the structures have any distinction, their renovation, or even destruction, is beyond the scope and reach of CEQA. (See *Martin v. City and County of San Francisco* (2005) 135 Cal.App.4th 392, 403-405.)

general condition of the property was deteriorating. In October 2008, Low and Lahaussois requested a permit to build an underground garage.

By September of the following year, their plans had expanded considerably. Their application for a conditional use authorization advised the City that they proposed "to renovate and remodel the Filbert Street Cottages . . . , resulting in the creation of four dwelling units. . . . A new three-story rectangular-plan addition would be constructed at the rear of the cottages, adding living area to each cottage and would abut the retaining wall . . . . An approximately 5,455 square foot subterranean parking garage with 8 parking spaces would be constructed underneath the footprint of the cottages and the addition . . . . Vehicular access to the garage would be provided by a car lift."

At a public hearing held by the Planning Commission on April 8, 2010, counsel for neighbors Julie De Martini and Gerald De Martini voiced the only opposition to the proposed project. At the conclusion of the hearing, the Planning Commission granted the Low and Lahaussois application.

Several aspects of that decision are pertinent. First, the decision, which is in the form of a 14-page "motion," incorporates 11 pages of "findings," two of which were that the "proposed project meets the criteria of the Class 32 categorical Exemption," and that "the Commission finds that the Categorical Exemption is adequate for its use as the decision-making body for the approval of the project, and that no further environmental review is required for the project." Second, the motion recites that "Any aggrieved person may appeal this Conditional Use Authorization to the Board of Supervisors within thirty (30) days after the date of this Motion No. 18072. The effective date of this Motion shall be the date of this Motion if not appealed (After the 30-day period has expired) OR the date of the decision of the Board of Supervisors if appealed to the Board of Supervisors."[3] Third, the motion had a two-page "Conditions of Approval" appended as Exhibit A, and the wording of those conditions clearly anticipated the issuance of a "Building Permit for the Project."

[3] The 30-day period is specified by San Francisco Planning Code section 308.1.

On May 10, 2010, the Planning Department posted[4] a Notice of Exemption for the proposed project, stating: "A determination has been made that the project in its approved form will not have a significant effect on the environment." The Department explained this conclusion in its "Certificate of Determination [¶] Exemption from Environmental Review" as follows: "CEQA State Guidelines Section 15332, or Class 32, provides an exemption of an in-fill development which meets [various] conditions.[5] . . . [T]he proposed project is an in-fill development that would have no adverse environmental effects and which meet all the various conditions prescribed by Class 32. Accordingly, the proposed project is appropriately exempt from CEQA under Section 15332. . . . [¶] . . . from environmental review."

Thirty-eight days later, on June 17, 2010, counsel for the De Martinis sent a letter to the Board of Supervisors purporting to "hereby appeal the adoption of a categorical exemption for the proposed significant alteration of the landmark cottages at 1338 Filbert Street." "Pursuant to the Interim Procedures of Appeals for Negative Declaration and Categorical Exemptions No. 5," the clerk of the Board of Supervisors solicited the City Attorney's opinion as to whether "the appeal has been filed in a timely manner." The same day that he received this request, June 18, 2010, the City Attorney responded that

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[4] The Guideline dealing with the nature and features of notices of exemption provides: "All public agencies are encouraged to make postings pursuant to this section available in electronic format on the Internet." (Guideline, § 15062, subd. (c)(3).) The notice prepared by the Planning Department bears a stamp showing that the notice was "posted" from May 10 to June 15, 2010. It also bears a file stamp of May 10, 2010 by the City Clerk.

[5] The cited Guideline reads: "Class 32 consists of projects characterized as in-fill development meeting the conditions described in this section. [¶] (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations. [¶] (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses. [¶] (c) The project has no value, as habitat for endangered, rare or threatened species. [¶] (d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality. [¶] (e) The site can be adequately served by all required utilities and public services." (Guideline, § 15332.)

"it is our view that the appeal is timely. Therefore, the appeal should be calendared before the Board of Supervisors."

But on July 6 the City Attorney reversed course, advising the clerk: "Consistent with our public advice to you in a memorandum dated February 22, 2008, . . . it is our opinion that the appeal is untimely. As stated in the February 22, 2008 memorandum, 'for a project requiring a conditional use permit, a CEQA appeal will be ripe and timely if filed after the Planning Commission approves the conditional use permit but before the 30-day period for appeal of the conditional use permit to the Board of Supervisors expires.' As the conditional use permit was final prior to the filing of the appeal, we conclude that the appeal is untimely."

The clerk advised the De Martinis' counsel of this change on July 7. Eleven days later, counsel sent a letter to the Board of Supervisors' clerk "to request a re-reversal of the timeliness decision . . . . If not, I request that the matter be placed before the Board of Supervisors for its assertion of jurisdiction." The clerk advised counsel that the City Attorney reiterated its view that "the appeal was not timely filed."

In September 2010, at the request of the Department of Building Inspection, Low and Lahaussois filed two new, additional, permit applications to reflect certain "small modifications" to the underground garage plans. The permit applications were approved by the Department of Building Inspection on January 31, 2011.

The following month the De Martinis tried to appeal, ultimately to be advised by the Board of Appeals that the attempt was "void," on the ground that "§ 4.106(a) of the San Francisco City Charter prohibits the Board of Appeals from accepting appeals of building or demolition permits concerning projects that have received permits or licenses pursuant to a Conditional Use (CU) authorization by the Planning Commission. [¶] . . . [T]his office has verified that the . . . project has indeed received a CU authorization (PC Motion No. 18072)."[6] The Board of Appeals reached this conclusion only after it

[6] The charter provision cited provides: "The Board shall hear and determine appeals with respect to any person who has been denied a permit or license, or whose permit or license has been suspended, revoked or withdrawn, or who believes that his or

had conducted two-days of hearings, on March 9 and March 16, at which the De Martinis fully developed their objections.

Meanwhile**,** on February 14, 2011, counsel for the De Martinis wrote to the clerk for the Board of Supervisors that she was "appealing the issuance of a Class 32 categorical exemption for three project building permits, attached. The exemptions were approved on January 10, 2011, as shown on the back of each permit. The permits themselves were each approved on January 31, 2011." Again, on advice of the City Attorney, the clerk refused to process the appeal.

At this point the opponents of the project resorted to the courts. Together with the Friends of the Landmark Filbert Street Cottages—described as "an unincorporated association of San Francisco residents formed in April 2011" to which they belonged—on April 20, 2011, the De Martinis filed a petition for a writ of mandate, against the City, the Board of Supervisors, and various municipal entities, with Low and Lahaussois named as real parties in interest.[7] The trial court denied the petition, and this timely appeal followed.

REVIEW

No CEQA action is necessary if a proposed private development does not qualify as a "project," defined as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (§ 21065.) If the proposed development meets this definition, the public agency responsible for approving the proposed project must then determine whether the proposed project then qualifies under one of the 15 statutory exemptions (§ 21080, subds. (b)(1)-(b)(15)) or one of the 33 "class" or "categorical" exemptions set forth in the

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her interest or the public interest will be adversely affected by the grant, denial, suspension or revocation of a license or permit, except for a permit or license under the jurisdiction of the Recreation and Park Commission or Department, or the Port Commission, or a building or demolition permit for a project that has received a permit or license pursuant to a conditional use authorization." (S.F. Charter, § 4.106(a).)

[7] For purposes of simplicity, we will henceforth employ the collective designations of "plaintiffs," "the City," and "real parties."

Guidelines.[8] (§ 21084; Guidelines §§ 15061, 15300-15333, 15354 [" 'Categorical exemption' means an exemption from CEQA for a class of projects"].) If the proposed project is either statutorily or categorically exempt, it "is not subject to CEQA, and no further environmental review is required." (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 286.) If the public agency determines that a proposed project is exempt, "[t]he agency need only prepare and file a notice of exemption (see CEQA Guidelines §§ 15061, subd. (d), 15062, subd. (a)), citing the relevant statute or section of the CEQA Guidelines and including a brief statement of reasons to support the finding of exemption (*id*., § 15062, subd. (a)(4))." (*Muzzy Ranch Co. v. Solano County Airport Land Use Com*., *supra*, 41 Cal.4th 372, 380.)

But what happens if someone believes a proposed development has been erroneously granted a categorical exemption? Answer: It may be challenged as contrary to the goals of CEQA. "A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (Guidelines § 15300.2, subd. (c).) In other words, a categorical exemption should not be granted where there is any fair argument or reasonable possibility that the proposed development may have a significant effect on the environment. (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 266-267.) We and other courts have held that if the public agency does grant a categorical exemption, it is impliedly concluding that this exception does not apply. (*Association for Protection Etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 731-732 and decisions cited.) That determination would be upheld on review if the party challenging the exemption cannot "produce

[8] There is one additional exemption that is not spelled out in the Guidelines. "A project that qualifies for neither a statutory nor a categorical exemption may nonetheless be found exempt under what is sometimes called the 'commonsense' exemption, which applies '[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment' (CEQA Guidelines, § 15061, subd. (b)(5))." (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 380.)

substantial evidence that the project has the potential for substantial adverse environmental impact" (*id*. at p. 728), or "substantial evidence in the record on which a fair argument can be made that the project may have significant environmental effects." *Voices for Rural Living v. El Dorado Irr. Dist.* (2012) 209 Cal.App.4th 1096, 1108.)[9]

However, judicial review is not available unless and until the challenger has exhausted whatever administrative remedies are available. (*Tomlinson v. County of Alameda, supra*, 54 Cal.4th 281, 285, 291; *No Wetlands Landfill Expansion v. County of Marin* (2012) 204 Cal.App.4th 573, 585 ["Where an administrative appeal lies under CEQA, a party . . . *must* pursue that appeal . . . or is barred from doing so in court."].) It is at this point that the issue before us begins to come into focus.

CEQA specifies that "If a nonelected decisionmaking body of a local . . . agency . . . determines that a project is not subject to this division, that . . . determination may be appealed to the agency's elected decisionmaking body, if any." (§ 21151, subd. (c); Guidelines § 15061, subd. (e) [same].) Notwithstanding use of the word "may," there is no dispute that an appeal procedure is mandatory. (See *Vedanta Society of So. California v. California Quartet, Ltd*.(2000) 84 Cal.App.4th 517, 525-526.)

But it is the nuts and bolts for prosecuting such an appeal that draws plaintiffs' ire. They insist that, 11 years after the Legislature imposed the appeal requirement of section 21151, "San Francisco has still not adopted procedures for mandatory administrative appeals of exemptions to the elected Board of Supervisors," and that "in the absence of adopted regulations for appeals . . . , the City Attorney is without authority to find appeals

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[9] One court very sensibly noted that "the type of analysis conducted by a reviewing court will depend on the type of inquiry the agency has conducted, i.e., whether the agency itself has applied a fair argument or a traditional approach. Under one type of inquiry by an agency, the agency will *weigh evidence* and *make a finding* as to whether there will be a significant effect. This is the traditional approach. Under another type of inquiry by an agency, it will simply inquire whether, as a matter of law, the record contains credible evidence *to support an argument* that there may be a significant effect, but the agency would not *weigh the evidence* or *resolve any conflict.* This is the fair argument approach." (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego, supra*, 139 Cal.App.4th 249, 263.)

untimely, as here, unless the delay is found to be unreasonable by the Board of Supervisors based on substantial evidence. State law provides for CEQA appeals to elected decision makers without deadline. (Pub. Resources Code, § 21151.) Such appeals should be allowed unless the statute of limitations provided for CEQA actions under the Public Resources Code has expired."

This the City denies, asserting in its brief that "The Clerk of the Board of Supervisors has published 'Interim Procedures for Filing Appeals of California Environmental Quality Act Environmental Exemptions and Negative Declarations' ('Interim Procedures') explaining the process." A visit to the City's website will verify that the described document is available as a pdf that includes: (1) the two pages of 'Interim Procedures'; (2) a one-page summary of the $534 fee for commencing an appeal and how it may be waived for refunded; (3) the "Application Packet for Board of Supervisors Appeal Fee Waiver," and; (4) the February 22, 2008 memo from the City Attorney to the "Clerk, Board of Supervisors" entitled "Amendments to CEQA Guidelines Affecting Board of Supervisors CEQA Appeal Procedures for Negative Declarations and Exemption Determinations/Determining Whether Appeals are Ripe for Review and Timely Filed." (This memo is the basis for the City Attorney's opinions to the Clerk that plaintiffs' attempted appeals were untimely.) (http://www.sfbos.org/Modules/ShowDocument.aspx?documentid=39207, accessed on January 27, 2014.) This certainly appears to qualify—in plaintiffs' terminology—as "adopted procedures for mandatory administrative appeals of exemptions to the elected Board of Supervisors," thus satisfying the City's duty to establish procedures for its responsibilities in the administration of CEQA. (Guidelines § 15022.)[10]

[10] Moreover, the City Attorney advises that during the pendency of this appeal the Board of Supervisors did adopt two ordinances that codified procedures for administrative appeals in CEQA cases, including appeals of categorical exemptions.

The usual question would then be, whether having this administrative remedy, plaintiffs failed to exhaust it.[11] However, this is not, as argued by plaintiffs, the usual case.

The Planning Commission's "motion" of April 8, 2010 clearly advised plaintiffs that they could "appeal this Conditional Use Authorization to the Board of Supervisors within thirty (30) days after the date of this Motion." Thus, plaintiffs would have 30 days, commencing April 9 and ending May 9, to file their *administrative* appeal. May 10 was when the Planning Department posted the notice of exemption for the proposed project. The only purpose of that posting was "to trigger the running of the limitations period," namely, the 35-day period specified in section 21167, subdivision (d) for commencing legal challenges based on this type of alleged CEQA violation. (*Apartment Assn. of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1171.) But it was not until June 17, 38 days later, that plaintiffs advised the Clerk that they wanted to appeal. Thus, whatever the utility or efficiency of the City's appeal procedure, plaintiffs failed to invoke it with a timely appeal. Yet there is a more fundamental problem because, almost at the same time, a far more important state deadline was expiring.

"CEQA provides unusually short statutes of limitations on filing court challenges to the approval of projects . . . ." (Guidelines § 15112, subd. (a).) "CEQA's purpose to ensure extremely prompt resolution of lawsuits claiming noncompliance with the Act is evidenced throughout the statute's procedural scheme. Such suits have calendar preference; more populous counties must designate one or more judges to develop CEQA expertise so as to permit prompt disposition of CEQA claims; and expedited briefing and hearing schedules are required. (§§ 21167.1, 21167.4.) [¶] Courts have often noted the

[11] This was one of the affirmative defenses raised by the City and real parties in their joint answer, but it was not addressed by the trial court. In light of the circumstances shown here, there might arise an instance where the City's administrative appeal, if actively pursued, could not be completed prior to the expiration of the CEQA-imposed statute of limitations, and therefore might be grounds for relaxing strict application of the exhaustion requirement. We merely mention this possibility in passing.

Legislature's clear determination that ' "the public interest is not served unless CEQA challenges are promptly filed and diligently prosecuted." ' [Citations.] . . . 'The Legislature has obviously structured the legal process for a CEQA challenge to be speedy . . . .' [Citation.]" (*Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 500 (*Stockton Citizens*).)

The statute of limitation for a challenging a notice of exemption is one of the shortest, a mere 35 days after the notice is filed. (§ 21167, subd. (d); Guidelines § 15112, subd. (c)(2).) "The express statutory language of section 21167, subdivision (d) . . . strongly confirms that litigation challenging the *validity* of an agency's determination to allow a project to proceed under a CEQA exemption must be *timely*, and that the shortest applicable period of timeliness is measured from the date on which an NOE [notice of exemption] setting forth that determination is filed. Section 21167(d) provides, in pertinent part, that '[a]n action or proceeding alleging that a public agency *has improperly determined* that a project is not subject to this division . . . *shall be commenced within 35 days* from the date of the filing by the public agency . . . of the *notice* authorized by . . . subdivision (b) of [s]ection 21152.' (Italics added.) Thus, under the explicit statutory terms, claims of *impropriety* in the agency's exemption determination may only be addressed in lawsuits commenced within 35 days after the agency properly files a *notification* of that determination, i.e., an NOE." (*Stockton Citizens*, *supra*, 48 Cal.4th 481, 502.) The timeliness of a lawsuit is an entirely separate issue from the merits, and if the litigation is untimely, the merits are beyond examination. (*Id*., at pp. 499, 501 & fn. 10, 504, 510.) "[F]laws in the decision-making process underlying a facially valid and properly filed NOE do not prevent the NOE from triggering the 35-day period to file a lawsuit challenging the agency's determination that it has approved a CEQA-exempt project." (*Id*. at p. 489; see also p. 501.)

Plaintiffs do not argue that the notice of exemption filed by the Planning Commission on May 10, 2010, is other than facially valid and properly filed.[12] Apart from attacking the perceived defects in the City's administrative appeals process, plaintiffs do not argue that their initial attempt to appeal the exemption decision was timely according to the 30-day period specified in the notice of exemption. Plaintiffs also concede that they missed the 35-day CEQA deadline, which lapsed long before they filed their verified complaint on April 20, 2011. Apart from this single reference to the CEQA statute establishing that iron deadline, the entirety of plaintiffs' brief is devoted to the perceived defects in the administrative appeals procedures, both to the Board of Supervisors and the Board of Appeals. Plaintiffs proceed on the implicit assumption that those defects would in some fashion toll the running of the 35-day period. But *Stockton Citizens* demonstrates that this assumption cannot be indulged.

Plaintiffs' only mention of their second attempt to appeal to the Board of Supervisors in February 2011—the one from the "exemption . . . approved on January 31, 2011, as shown on the back" of each of the attached permits—occurs in the context of plaintiffs' arguing that their *administrative* appeal was timely. If plaintiffs see this project as necessitating two notices of exemption, or if they conceive of the permits as being tantamount to a second notice, or a reconsideration of the exemption, they identify no authority for any of these approaches.

As mentioned, plaintiffs' second attempt to get an appeal before the Board of Supervisors concerned the issuance of the permits by the Department of Building Inspection in January 2011. The trial court determined that issuing the permits was a ministerial decision, and thus not a separate basis for demanding the full CEQA analysis. (See § 21080, subd. (b)(1); Guidelines § 15268, subd. (a) ["Ministerial projects are

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[12] If no notice was filed, if the notice was not facially valid or properly filed, or if it did not evidence approval of the proposed project, the CEQA period for seeking judicial relief would be 180 days. (§ 21167, subd. (d); Guidelines, § 15062, subd. (d); *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 963.) The notice of exemption here was filed on May 10, 2010, so even this longer period expired months before plaintiffs filed their petition on April 20, 2011.

exempt from the requirements of CEQA."], 15268, subd. (b)(1) [building permits presumed to be discretionary], 15369 ["A building permit is ministerial if the ordinance requiring the permit limits the public official to determining whether the zoning allows the structure to be built in the requested location, the structure would meet the strength requirements in the Uniform Building Code, and the applicant has paid his fee."].) That determination necessarily followed from issuance of the notice of determination on May 10, 2010, because it constituted the City's formal approval of the proposed project. (See Guidelines §§ 15062, subd. (a) [notice of exemption "shall be filed, if at all, after approval of the project"], 15352, subd. (a) [" 'Approval' means the decision by a public agency which commits the agency to a definite course of action in regard to a project"].)

"Whether an agency has discretionary or ministerial controls over a project depends on the authority by the law providing the controls over the activity." (Guidelines § 15002, subd. (i)(2).) "The determination of what is 'ministerial' can most appropriately be made by the particular public agency involved based upon its analysis of its own laws, and each agency should make such determination either as a part of its implementing regulations or on a case-by-case basis." (Guidelines § 15268, subd. (a).) The same is largely true for determining the date of a project's official "approval." Guidelines § 15352, subd. (a).)

Although plaintiffs make a brief attempt to demonstrate that issuance of the permits was not a ministerial act, they do so with only the conclusory statement that the City Attorney's February 2008 memorandum "acknowledges the contrary." Plaintiffs furnish no particulars substantiating this statement. Nor do they provide any discussion of the relevant San Francisco municipal law—or make any effort to establish that the trial court's determination lacks the support of substantial evidence. (See §§ 21168, 21168.5; *Sierra Club v. Napa County Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 171.) Significantly, plaintiffs acknowledge that the two permits issued in January 2011"noted their reliance on the categorical exemption for each." This acknowledgment implicitly recognizes that there is only the one notice of exemption filed by the Planning Commission on May 10, 2010, evidencing official approval of the project. (Guidelines

§§ 15062, subd. (a), 15352, subd. (a).) The significance is that is only that date commenced the 35-day filing period. The subsequent issuance of permits is not material for CEQA purposes. (See *Madrigal v. City of Huntington Beach* (2007) 147 Cal.App.4th 1375, 1381-1383 [effect of 1996 approval of conditional use permit and notice of exemption was that with subsequent issuance of grading permits "there is nothing to challenge under CEQA"].)

Nor can plaintiffs camouflage their motive before the Board of Appeals. Plaintiffs were obviously hoping that entity would overturn the permits, thus effectively nullifying the exemption and halting the project. There is no reason to sanction plaintiffs' attempt to sidestep CEQA's 35-day deadline.

It is clear from a careful reading of plaintiffs' brief that their true objective is to get the Class 32 categorical exemption overturned, primarily on the ground that there was debatable fair argument as to whether the proposed project could have an adverse environmental impact. Even their frustrated attempt at appealing to the Board of Appeals was based on the alleged failure of the Department of Public Inspection "to meet applicable . . . environmental protection standards." Like their attack on the supposedly defective procedures for administrative appeals, this argument is aimed at attacking the validity of real parties' exemption, i.e., the merits of the decision to grant the exemption. It too is therefore covered by the principle that "litigation challenging the *validity* of an agency's determination to allow a project to proceed under a CEQA exemption," or "flaws in the approval process," or "claims of *impropriety* in the agency's exemption determination may only be addressed in lawsuits commenced within 35 days after the agency properly files a *notification* of that determination." (*Stockton Citizens*, *supra*, 48 Cal.4th 481, 489, 502.)

In conclusion, the unalterable points are that the project did receive an exemption and that the period for challenge passed many months before plaintiffs sought judicial relief. Plaintiffs cite no statutory, regulatory, or decisional authority requiring, or even

contemplating, a second notice of exemption for the same project.[13] From what our Supreme Court said in *Stockton Citizens*, after expiration of the relevant limitation period specified by section 21167, the public interest is deemed best served by letting real parties proceed. (*Stockton Citizens, supra*, 48 Cal.4th 481, 500.) We therefore agree with the trial court that plaintiffs' efforts to restart the CEQA process must be rejected. Plaintiffs were not entitled to relief because they failed to establish that the City "has not proceeded in a manner required by law." (§ 21168.5.)

DISPOSITION

The judgment is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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[*]Brick, J.

[13] There is authority for requiring supplements or addenda to an EIR or a negative declaration (§ 21166 ; Guidelines §§ 15162-15164), but none for notices of exemption.

[*] Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.